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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-14

CITY OF CHICAGO and MICHAEL A. CARDILLI,

Petitioners,

vs.

MICHAEL L. SHAKMAN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, City of Chicago and Michael A. Cardilli, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in this cause.

OPINION BELOW

The opinion of the Court of Appeals was handed down April 9, 1976, and is reported at 533 F.2d 344. The opinion is reproduced in the Appendix to this petition.

JURISDICTION

This petition is filed within ninety days of the date of the entry of the Seventh Circuit's judgment, April 9, 1976. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioners filed no petition for rehearing.

QUESTIONS PRESENTED

1. Whether the Court of Appeals judgment permitted a violation of due process by approving contempt sanction for the novel purpose of "assuring future compliance" with an order, if the alleged contemnors are presently complying with the order, have only been alleged to have violated the order once in the past, and there is no allegation of a threat or fear of future disobedience.

2. Whether petitioners were denied criminal safeguards in a contempt proceeding asserted to be civil but which sought and imposed penal sanctions appropriate only for criminal contempt.

3. Whether the petitioners were found guilty of affecting employees' employment relationship without evidence that employment conditions were changed in any manner. *Gregory v. Chicago*, 394 U.S. 111 (1969).

4. Whether the judgment permitted an alleged contemnor to be found guilty of violating an order of court without plaintiffs' offering evidence that he had knowledge of the order.

5. Whether the City of Chicago may be liable for the unauthorized political activities of an employee.

STATUTES AND RULES

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Civil Procedure, Rule 65(d):

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its

issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Federal Rules of Criminal Procedure, Rule 42:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT OF THE CASE

This was an appeal by the City of Chicago and Michael A. Cardilli, an employee in Chicago's Department of Streets and Sanitation, from an order finding them in contempt of court and fining them costs and attorneys' fees for allegedly violating a consent judgment entered May 5, 1972. The consent judgment had been agreed to by some forty-five of the defendants, including Chicago, other political subdivisions in Illinois, local governmental officials, and local political parties and party officials. The 1972 judgment stated that certain positions in governmental service shall not be conditioned or affected by political considerations.

A month prior to the respondents' filing a contempt petition against the petitioners, the respondents commenced an ancillary proceeding against Chicago and other parties to the judgment. Although notice of the 1972 judgment had been given to the affected employees in 1972, on the eve of the winter, 1975 Chicago city-wide elections, the plaintiffs (the present respondents) moved in the district court that thirty of the defendant parties to the judgment having employees in Chicago re-issue notices of the 1972 judgment. The proceeding upon that motion was not a contempt proceeding.

Six days before the scheduled hearing upon the question of re-issuing notice, the plaintiffs filed the instant petition for rule to show cause why Chicago and Cardilli should not be found in contempt for violating the May 1972 decree. The petition asked that the accused defendants be found in civil contempt. It accused Cardilli of requesting six unnamed sanitation workers to take and circulate petitions for the renomination of Mayor Daley,

who was running for re-election. The City of Chicago was said to be liable because it, "as the employer of [Cardilli], must be adjudged to have full responsibility for [his] actions. . . ."

Plaintiffs' petition for rule to show cause requested the court to "fix a fine to be imposed upon such persons or corporation, . . . impose conditions to purge the contempt, . . . enter additional relief to enforce and to prevent violations of the judgment by [others] . . . and . . . [award] costs and disbursements and a reasonable counsel fee."

The precise language of the May 5, 1972 decree alleged to have been violated is:

> "E. Each and all of the defendants and others named or referred to in paragraph C above are permanently enjoined from directly or indirectly, in whole or in part:
>
> "(1) conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor.
>
> "(2) knowingly causing or permitting any employee to do any partisan political work during the regular working hours of his or her governmental employment, or during time paid for by public funds; provided that nothing contained in this subparagraph (2) shall prohibit governmental employees from voluntarily using vacation time, personal leave time or from taking nonpaid leaves of absence to do political work, but permission to do so must be granted nondiscriminatorily."

These provisions were said to have been violated in December, 1974; there was no allegation that they were not being obeyed fully at the time the contempt petition was filed.

Following the filing of the contempt petition, a combined hearing was held on the two issues—one, to which thirty of the defendants were a party, concerned whether they should be ordered to re-issue a notice to employees of the 1972 judgment; the other was the instant contempt proceeding against Cardilli and Chicago.

The Cardilli-Chicago evidence concerned Mr. Cardilli's activities on December 18 and 19, 1974. On December 18, 1974, six employees of the Department of Streets and Sanitation from the Third Ward were requested to appear at the office of Mr. Cardilli in City Hall on December 19. On that day, five employees were working. They traveled together from work at 11:30 a.m. and returned to work at 1:30-1:45 p.m. The sixth employee was not working that day but he also appeared at Mr. Cardilli's office at the noon hour. Mr. Cardilli was Director of Administration for the Department of Streets and Sanitation.

One employee, Mr. Jones, testified that in his interview with Mr. Cardilli, Cardilli did not identify himself or his position. He merely asked Jones if he were willing to take and circulate petitions for Mayor Daley. Jones responded with a question about what would happen if he declined. Cardilli gave no answer, but repeated his request.

Mr. Jones did not indicate whether he desired or did not desire to take petitions. In any case he took and circulated one petition. Jones never heard from Cardilli after December 19, nor did he testify to any change in his job condition after that date. He also did not testify to telling anyone about the interview.

Mr. Duhart, another sanitation worker, stated his interview was substantially the same. But when Duhart asked Cardilli if he would lose his job if he declined the

petitions, Cardilli answered that Duhart would not:

> "I asked him . . . 'Are you asking me to volunteer?' He [Cardilli] said, 'yes.'
>
> "I said, 'No, I won't circulate the petitions.' And I—he said, 'That's all.'
>
> ". . . I said, would I lose my job because of this, you know and he said, 'No, . . .'"

Duhart then declined to take any petitions.

Duhart did not testify to any contact with Mr. Cardilli following December 19, 1974 or that his employment was affected in any way.

Upon this testimony the district court found both respondents guilty of violating the decree by "conditioning," "basing," "prejudicing" or "affecting" a term or aspect of the governmental employment of the six employees. A second provision of the decree, prohibiting political work during working hours, was also found to have been violated. As sanctions, the City and Cardilli were fined the amount of the plaintiffs' costs and attorneys' fees. At the same time, as a result of the combined hearing, the district court also ordered the thirty parties, including Chicago, to send reminder notices.

Although the plaintiffs' bill of costs and itemization of attorneys' fees contained many items relating to the reminder notice proceedings against the thirty defendants, the district court assessed costs only against the City of Chicago and Cardilli, and attorneys' fees only against the City of Chicago. None of the thirty other parties were assessed costs of any kind, although plaintiffs and many of the defendants participated in prehearing discovery and the defendants actively opposed the motion to re-issue the notice of judgment.

The petitioners appealed, arguing, *inter alia*, that it was error for them to be charged with and found guilty of *civil* contempt since the act they were accused of committing was a past completed act and thus could only be *criminal* contempt. Moreover, the fine was punitive, since it was not fashioned to remedy a past harm. The United States Court of Appeals for the Seventh Circuit affirmed. 533 F.2d 344. The Court held that since a past completed act violating a prohibitory order could not invariably be considered criminal contempt, it was not error for the Shakman plaintiffs' petition to charge a civil contempt: "[S]ince plaintiffs' purpose in seeking relief in contempt proceedings was to coerce future compliance, the district court properly found [Cardilli and Chicago] in civil contempt of court." Appendix, p. 9a. It held that the petition for rule to show cause, which charged only civil contempt, was proper since the contempt order was remedial in nature. The remedy was prospective, the court stated, and could justifiably be imposed to "assure future compliance with the district court's 1972 judgment." Despite the Court's statement regarding the future, plaintiffs had never made allegation nor presented evidence that Chicago or Cardilli would continue their allegedly contumacious behavior, which was confined to two days in December, 1974, nor did the plaintiffs allege that they feared future misconduct on the part of the alleged contemnors. At the time of the district court's entry of the order "to assure future compliance," the petitioners were obeying the 1972 judgment in full.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' JUDGMENT PERMITS CONTEMPT SANCTIONS TO BE IMPOSED TO PREVENT POSSIBLE FUTURE DISOBEDIENCE TO AN ORDER; PUNISHMENT FOR BEHAVIOR NOT YET COMMITTED VIOLATES DUE PROCESS.

The Court of Appeals attempted to justify the contempt and contempt sanctions as civil by finding them "remedial" in character. The injury to be remedied, however, was not past disobedience to the district court's order; instead the Court of Appeals found that the sanction remedied possible future misbehavior. The defendants were thus punished for conduct they had not yet committed and may never commit. Clearly the fines imposed in this case for conduct not committed or threatened violates due process guaranteed by the Fifth Amendment.

If a party is presently refusing to comply with an order of court, or if he contemptuously states he will refuse to obey such an order, *United States v. United Mine Workers*, 330 U.S. 258 (1947), or if he had in the past disobeyed an order of court, the power of the court to punish for civil or criminal contempt is undoubted. But the imposition of sanctions to "assure future compliance" with an order, as the court below did, is without precedent, especially at a time when the order is being obeyed.

At trial and in the Court of Appeals, the City of Chicago and Michael Cardilli claimed that the petition for rule to show cause was defective in charging civil contempt both because the acts they were claimed to have committed were criminal in nature and because the relief sought in the petition was only appropriate for

criminal contempt. The Seventh Circuit answered by stating that in determining whether a contempt is criminal or civil, one looks not to the act, but to the remedy sought. If the penalty imposed is punitive, the contempt is criminal, but if the sanction is sought to coerce compliance or remedy the damage caused by the contemptuous behavior, it is civil. (In the present case, of course, the former ground is not applicable because the petitioners were in compliance at the time of the proceedings in the district court.) The Court stated that the present contempt may be thought civil because it is remedial in nature. However, what will be remedied is a mystery, since the allegedly contemptuous activities ceased a month prior to the filing of petition for rule to show cause. The contempt petition also did not allege that Cardilli and Chicago would refuse to comply in future. Moreover, the plaintiffs did not prove or allege monetary damage. Indeed, the court, itself, stated, "nothing in the pleading or elsewhere in the record sheds any light on the injury or amount of injury sought to be compensated." Appendix, p. 8a, n. 9. The only "remedy" the sanction could be thought to accomplish is the coercion of "future compliance." Appendix, pp. 8a and 9a.

Imposing sanctions against the City and Cardilli for contempt thus is punishment solely for possible future misbehavior. This is certainly a novel concept in the law. The contempt sanctions were imposed, not to punish or remedy a past act, nor to put a halt to a continuing failure to comply, but to punish the defendants, apparently upon the possibility they might violate the 1972 judgment at some time in the future. The theory of punishment now for future disobedience enunciated by the Seventh Circuit is unsupported by citation of authority and, as far as these petitioners can determine, unprecedented.

The sanctions imposed upon Cardilli and Chicago are particularly odious in this case. Not only did the plaintiffs fail to state allegations and present proof of the likelihood of non-compliance in future, but they failed to allege a pattern of past disobedience. In more than two and one-half years between the entry of the order and the filing of the petition for rule to show cause, and out of the 42.000 city employees, the plaintiffs have accused the City or City employees of violation of the order only once.* The Court of Appeals judgment permits sanctions to be imposed upon the *possibility* of future contemptuous behavior. Its punishment of unproven misconduct should be reversed.

II.

THE DECISION IMPOSES PUNISHMENT FOR CRIMINAL CONTEMPT IN A CIVIL PROCEEDING, IN VIOLATION OF SUPREME COURT DECISIONS.

The rule to show cause alleged, and testimony was presented at trial in an attempt to show, that on two days in December, 1974, Chicago and Michael Cardilli had violated a prohibitory order of court. No claim is made that the conduct continued past December 19, 1974 or that it was continuing at the time the petition for rule to show cause was filed. Although the petition expressly stated that the City and Cardilli had committed civil contempt, the act complained of, as defined by the Supreme Court, was, if true, criminal contempt.

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* In the present proceeding below, the plaintiffs also accused two other employees of the City of Chicago of committing contempt of the May, 1972 order. The plaintiffs withdrew their petition as to one employee and the district court found the other not guilty.

The harm to the defendants from this procedure is severe. They were denied certain procedural and substantive safeguards available in criminal contempt proceedings but unavailable to them because they were tried upon a petition charging criminal violations but claiming to be civil. In a civil proceeding, the defendants could not claim their rights to trial by jury, *Bloom v. Illinois*, 391 U.S. 194 (1968), *Shillitani v. United States*, 384 U.S. 364 (1965), Rule 42 (b) Federal Rules of Criminal Procedure; proof of guilt beyond a reasonable doubt, *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418 (1911); decline to be a witness, *ibid*; be prosecuted by the government, not a party, *ibid*, and the right not to be assessed costs, *ibid*.

In addition, while a continuing refusal to comply with an order of court is civil contempt, for which indeterminate sanctions may be imposed, measured by the length of time the contumacious behavior continues, *United States v. United Mine Workers*, 330 U.S. 258 (1947), criminal contempt is a past completed act for which definite rather than conditional penal sanctions are imposed. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). This was also the definition stated by the Fifth Circuit in *Skinner v. White*, 505 F.2d 685, 688-9 (1974):

> "The essential distinctions between the civil and criminal contempt are that:
>
> (1) Civil contempt lies for refusal to do a commanded act, while criminal contempt lies for doing some forbidden act;
>
> (2) A judgment of civil contempt is conditional, and may be lifted if the contemnor purges himself of the contempt, while punishment for criminal contempt is unconditional; . . ."

The respondents' behavior complained of by petitioners had already ended at the time of their petition. Had it instead been a continuing refusal to do an act, the "usual remedy in such a situation is to impose coercive sanctions until the act is performed. This is a function of civil contempt." *United States v. United Mine Workers, supra,* at p. 300 n. 73. See also, *Gompers v. Bucks Stove and Range Co.,* 221 U.S. 418, 442, 449 (1911).

While the penalty for criminal contempt is intended to be punitive only, *United Mine Workers* at 302, the sanctions of civil contempt may be "employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *Ibid,* p. 303; *Gompers,* pp. 448-9.

Even if the criminal or civil nature of the contempt is measured by the character of the relief, rather than the character of the contumacious act, the present contempt is criminal. *Gompers v. Bucks Stove and Range Co.,* is directly on point and directly opposed to the judgment of the Court of Appeals here. In *Gompers,* the plaintiff accused the defendants of past completed acts allegedly contrary to an order of court. Like the present plaintiffs, the *Gompers* plaintiff failed to seek monetary damages. Instead, the plaintiff was awarded punitive sanctions. Although the relief in *Gompers* was imprisonment, it was analogous to the present sanctions in that it was in a definite, fixed quantity, measured neither by the amount of damage to the plaintiff nor the length of time the contempt continued (221 U.S. at 443-4):

> "The distinction between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.
>
> "In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required, but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience. Rapalje on Contempt, §§ 131-134; *Wells v. Oregon Co.,* 19 Fed. Rep. 20; *In re North Bloomfield Co.,* 27 Fed. Rep. 795; *Sabin v. Fogarty,* 70 Fed. Rep. 483.
>
> "But when the court found that the defendants had done what the injunction prohibited, and thereupon sentenced them to jail for fixed terms of six, nine and twelve months, no relief whatever was granted to the complainant, and the Bucks Stove & Range Company took nothing by that decree.
>
> "If then, as the Court of Appeals correctly held, the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt."

Here the determinate monetary sanctions were also wholly punitive and therefore criminal; the amount of the sanctions were not contingent upon Chicago's and Cardilli's compliance nor measured by the harm to the plaintiffs.

The petition here requested sanctions curiously mixed. It requested an unconditional fine (appropriate for criminal contempt), imposition of "conditions to purge the contempt" (appropriate in civil contempt, but only if the contempt is continuing), "additional relief to enforce" the judgment (perhaps civil, perhaps criminal, depend-

ing on its nature) and costs (available only in civil contempt).

The respondents were faced with defending a petition which was expressly civil, which charged the commission of offenses which could only be criminal contempt, and which sought penalties some of which were only appropriate for civil contempt, others only for criminal contempt. Proceeding against respondents under this mixture of proceedings constituted prejudicial error:

> "This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether if was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit." *Gompers* at p. 446.

The inability of the respondents to determine what kind of proceeding they were being charged with created a fatal defect. A similar conviction was ordered reversed in *Skinner v. White, supra*, 505 F.2d at 689, for the petitioners' failure to indicate the kind of proceeding: "This mélange of civil and criminal traits prevents, even upon appeal, a determination of the true character of the proceedings. . . . For this reason, alone, the district court judgment must be reversed."

And, as Mr. Justice Holmes stated in *Union Tool Co. v. Wilson*, 259 U.S. 107, 110 (1923); "Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for the purposes of review."

The unconditional punishment imposed upon the respondents below for the commission of a single act in the past was said by the Seventh Circuit in the instant opinion to be civil, in conflict with *Gompers* and *Skinner*. The resolution of the conflict between *Skinner* and the instant opinion of the Seventh Circuit, and the question of whether *Gompers* remains viable today merits consideration by this Court.

III.

CHICAGO AND CARDILLI WERE CONVICTED OF COMMITTING ACTS NOT CHARGED IN THE PETITION INITIATING THE PROCEEDING. *GREGORY v. CHICAGO*, 394 U.S. 111 (1969).

The pleading initiating the contempt proceedings, a petition for rule to show cause why Chicago and Cardilli should not be found in contempt, stated precisely which provisions of the May 5, 1972 judgment they were charged with violating. It alleged violation of paragraphs E(1) and E(2) of the judgment, which prohibited affecting the employment relationship upon political considerations. The exact E(2) prohibition was against "conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment." But evidence at trial absolutely failed to make any showing that the terms or conditions of employment of the six employees were affected in any way. There was no testimony about any event occurring following the date of the interviews, December 19, 1974. None of the employees interviewed, and no other witness, testified that anything occurred after December 19, 1974 and specifically that any changes were made in working hours, conditions, salary or any other aspect of employment. The testimony was that some of the employees agreed to take petitions, and others declined,

but there was no evidence nor a word of testimony that the employees' decisions made any difference in their employment. Although one employee testified he was afraid to decline the petitions, the petition for rule to show cause did not charge Chicago or Cardilli with exercising coercion or making threats, although a separate paragraph of the May 5, 1972 judgment prohibited making threats: "E(3) knowingly inducing, aiding, abetting, participating in, cooperating with or encouraging the commission of any act which is proscribed by this paragraph E, or threatening to commit any such act." Even if it is argued that the conduct of the City and Cardilli came within paragraph E(3), the petition for rule to show cause never alleged a violation of that paragraph, and the alleged contemnors were unable to defend against a claim not charged. Under *Gregory v. Chicago*, they may not be found guilty of conduct not charged.

IV.

THE JUDGMENT VIOLATED DUE PROCESS BY PERMITTING CARDILLI TO BE FOUND GUILTY WITHOUT PROOF HE HAD KNOWLEDGE OF THE ORDER ALLEGEDLY VIOLATED

The plaintiffs' proof regarding Mr. Cardilli totally failed in respect of one essential element of the offense of contempt. Even taking as true for the sake of argument that Mr. Cardilli's behavior was carried out during city working hours and that the employees he interviewed were compelled to take and circulate petitions, the testimony at trial did not contain proof or even an inference that Mr. Cardilli had knowledge that the consent decree existed and prohibited the alleged behavior.

It is fundamental that an injunctive order of court only binds parties and others who have actual knowledge of its issuance and its terms. Rule 65(d), F.R.C.P. Accordingly, a person may not be found guilty of contemptuously violating an order of court if he had no knowledge of the order or that his activities were contrary to the terms of the order. *Wilson v. North Carolina*, 169 U.S. 86, 600 (1890); *In re Rubin*, 378 F.2d 104 (3d Cir. 1967); *Yates v. United States*, 316 F.2d 718 (10th Cir. 1963); *United States v. Hall*, 198 F.2d 726 (2d Cir. 1952), cert. den. 345 U.S. 905.

The record is absolutely devoid of any reference to Mr. Cardilli's knowledge of the May 5, 1972 decree. When Mr. Cardilli was called as a witness in the contempt proceeding, counsel for plaintiffs did not direct a single question to him regarding his awareness of the decree and its terms. No other witness was asked nor gave any statement with respect to Mr. Cardilli's knowledge. There was no evidence as to whether Mr. Cardilli was hired before or after the 1972 judgment was entered.

For the district court to have entered a finding of Mr. Cardilli's guilt of violating the decree, it was necessary for it to determine that he had knowledge of the decree. No specific finding of knowledge appears in the findings of fact and conclusions of law of the contempt order. Since no evidence supports a belief that Mr. Cardilli had actual knowledge of the decree, that element of Mr. Cardilli's guilt rested upon speculation and conjecture. Consequently, because an element of the offense has not been proved beyond a reasonable doubt, by clear and convincing evidence—or by any evidence—the judgment of contempt was clearly erroneous and must be reversed as violating due process.

V.

THE CITY OF CHICAGO WAS ERRONEOUSLY FOUND RESPONSIBLE FOR THE UNAUTHORIZED ACTS OF ITS EMPLOYEE.

No accusation or evidence showed that the City of Chicago ordered Mr. Cardilli to act as he allegedly did, or that Mr. Cardilli was carrying out an express policy of the City. Instead, the City of Chicago's guilt is predicated upon a vicarious liability theory. The petition initiating the proceeding stated, paragraph 4, that "The Defendant City of Chicago, as the employer of [the accused] must be adjudged to have full responsibility for their actions in this regard." Not much more specifically, the district court stated that the City is responsible for the acts of subordinates and Mr. Cardilli was an agent who could bind his employer.

While it is true that a principal may be bound by acts of its agent, the principal is only bound by those acts performed within the scope of the agent's employment. If an activity is unauthorized or outside the scope of employment, the principal is free of liability.

The alleged acts of Mr. Cardilli were not shown to have been within the scope of his duties. Therefore, the City of Chicago could not have been held liable for Mr. Cardilli's activities performed outside the scope of the duties of his employment. Illinois law and other authorities are in accord with this principle. *Town of Pana v. Lippencott*, 2 Ill. App. 466, 476 (1877), aff'd 92 Ill. 24; Antieau, Municipal Corporation Law, § 11.02; McQuillin, Municipal Corporations, § 53.69, pp. 301-4.

Mr. Cardilli's alleged attempt to use his office to compell employees' political work was not an improper use of authorized power, but was altogether unauthorized by the City of Chicago.

The total lack of authority from the City to permit forcing political activity from subordinates is evident by the City's express statements to the contrary, and by Mr. Cardilli's statement that his activities were entirely his own idea.

The City of Chicago not only did not authorize forcing political work, but expressly prohibited it. This is clear from the City's agreement to the very consent decree of May 5, 1972 at issue here. The City agreed that employment shall not be conditioned upon or affected by political activity. Since this is the policy of the City, it clearly was not within the scope of Mr. Cardilli's employment to carry out the activities charged.

Moreover, Mr. Cardilli's testimony made obvious that his interviews were unauthorized. He stated that no one in the City, not the Mayor or his assistant, talked with Mr. Cardilli about the petitions. To request that petitions be circulated was his own idea. No evidence to the contrary was introduced. Nor did the plaintiffs introduce evidence that other Chicago employees behaved as Mr. Cardilli did.

Since Mr. Cardilli acted independently of any authorization by the City of Chicago or a City official—indeed, acting contrary to express City policy—and because requesting political work was beyond the scope of his duties, the City of Chicago may not be held vicariously liable for the alleged violations of the decree committed by Mr. Cardilli.

CONCLUSION

For these reasons a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit, and the judgment of that court should be reversed.

Respectfully submitted,

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July 8, 1976

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1666

MICHAEL L. SHAKMAN, et al.,
Plaintiffs and Petitioners-Appellees,

v.

DEMOCRATIC ORGANIZATION OF COOK COUNTY, et al.,
Defendants,

and

CITY OF CHICAGO and MICHAEL CARDILLI,
Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69 C 2145
BERNARD M. DECKER, *Judge.*

ARGUED JANUARY 5, 1976 — DECIDED APRIL 9, 1976

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and SPRECHER, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* Respondents appeal from the district court's determination of civil contempt entered against each of them for violating the injunctive provisions of the court's judgment of May 5, 1972, generally prohibiting certain various Illinois political organizations, governmental units, and their officers, agents and employees from compelling or coercing any governmental

employee to take part in any political activity as a condition of employment. Plaintiffs-petitioners are representatives of a class composed of the voters of the counties comprising the Northern District of Illinois. Respondents are the City of Chicago, a defendant in the original action, and Michael Cardilli, who at the time of the violations held the position of Director of Administration of the Department of Streets and Sanitation of the City of Chicago.

This appeal is the outgrowth of a class action first instituted by plaintiffs in 1970 and aimed at the political patronage employment systems and practices alleged to prevail in the counties which comprise the Northern District of Illinois.[1]

After this court reversed the district court's dismissal of the plaintiffs' original complaint (*Shakman* v. *Democratic Party Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970)), various defendants including respondent City of Chicago, agreed to the entry of a judgment in settlement of a part of the case. After a class action hearing, the district court entered judgment on May 5, 1972. The judgment provides that public employees, once hired, are not to be subjected to political requirements in connection with their jobs.[2] The injunctive provisions of the judgment prohibit those bound by the decree from permitting political activity to be undertaken on public time and also enjoins "conditioning, basing, or affecting any term or aspect of governmental employment on any political purpose."[3] The judgment is binding upon various

[1] A detailed examination of the complaint can be found in this court's earlier decision in this case. See *Shakman* v. *Democratic Party Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970).

[2] Paragraph D of the judgment provides in part:

> [A]ll compulsory or coerced political activity by any governmental employee are prohibited, and, once hired, a governmental employee is free from all compulsory political requirements in connection with his employment. . . .

[3] Paragraph E of the judgment provides:

> E. Each and all of the defendants and others named or referred to in paragraph C above are permanently enjoined from directly or indirectly, in whole or in part:
>
> (1) conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor.
>
> (2) knowingly causing or permitting any employee to do any partisan political work during the regular working hours of his or her governmental employment, or during time paid for

defendants, including the respondent City, who consented to its entry. The judgment also provides that, among others, it is binding upon "the present and future officers, members, agents, servants, employees and attorneys of each of the defendants."[4]

Pursuant to paragraph H of the judgment,[5] plaintiffs filed a petition for a rule to show cause why Edward Quigley and James Simpson should not be held in civil contempt of court for violating subsections 1 and 2 of paragraph E of the judgment. This petition was subsequently supplemented to add the City of Chicago and Michael Cardilli. The petition was based on the affidavit of United States Congressman Ralph Metcalfe. In the affidavit, Representative Metcalfe swore to the following facts. As the Democratic party committeeman of the Third Ward of Chicago, Representative Metcalfe "sponsored" many persons for employment with various governmental agencies of the City and County headed or controlled by members of the Democratic party. In early December of 1974, Representative Metcalfe announced

[3] (Continued)

> by public funds; provided that nothing contained in this subparagraph (2) shall prohibit governmental employees from voluntarily using vacation time, personal leave time or from taking nonpaid leaves of absence to do political work, but permission to do so must be granted nondiscriminatorily.
>
> (3) knowingly inducing, aiding, abetting, participating in, cooperating with or encouraging the commission of any act which is proscribed by this paragraph E, or threatening to commit any such act.

[4] Paragraph C of judgment of May 5, 1972. The paragraph also provides that in addition "all others in active concert or participation with any of the defendants . . . who receive actual notice of this judgment by personal service or otherwise" are bound. *Compare* Fed. R. Civ. P. 65(d).

[5] Paragraph H of the judgment provides:

> Jurisdiction is retained for the following purposes:
>
> (2) To enable the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the enforcement of compliance with the provisions contained herein, and for the punishment of the violation of any of such provisions. Application to enforce such provisions or to impose punishment for any such violation may be presented to this Court by any registered voter. . . .

This paragraph also provides that the district court retains jurisdiction to resolve remaining issues in the case, including the lawfulness of the practices presently enjoined. Proceedings with respect to those issues are currently pending in the district court.

that he would neither endorse nor organize the circulation of petitions for any candidate for the office of Mayor of the City of Chicago in the upcoming primary election. He was later advised that on December 18 and 19, 1974, numerous individuals associated with the Democratic organization of the Third Ward and employed by agencies of the City or County were summoned by their superiors to report to them during working hours. In particular, Edward Quigley, Deputy Commissioner of Sewers for the Bureau of the City met with his employees and requested that they circulate petitions of candidacy for Mayor Richard J. Daley. Also, James Simpson, Assistant General Superintendent of the Bureau of Streets and Sanitation of the City reportedly met with numerous of his employees and requested that they circulate such petitions. Representative Metcalfe also stated in his affidavit that many members of the Third Ward Democratic Organization told him that they did not want to circulate the petitions but felt that they would be terminated or otherwise discriminated against if they refused.

Upon deposing Simpson, plaintiffs learned that respondent Cardilli had interviewed many employees of his department during working hours and requested them to circulate similar petitions. Plaintiffs thereupon supplemented their original petition and added Cardilli as a respondent. In addition, plaintiffs added the City of Chicago as a respondent on the ground that as a defendant in the original action and employer of the three individuals named in the petition for a rule to show cause, it should be held responsible for their actions. Thereafter plaintiffs dropped Simpson from their petition. Respondents' motion to dismiss the petition was denied and a hearing was subsequently held.

At the hearing, George Jones testified that he and four other co-workers in the Streets and Sanitation Department reported to Simpson's office during working hours on December 19, 1974 after being summoned the previous day. Each of the five had been "sponsored" by Representative Metcalfe. He testified that they were taken in one at a time to see Cardilli. Cardilli's administrative assistant was also present. Jones testified that Cardilli asked him if he would take and circulate petitions of

candidacy for Mayor Daley. After being asked twice, Jones responded "Why? What would happen if I don't?" Cardilli then repeated "Are you going to take them?" Jones thereupon did.

Respondents City and Cardilli stipulated that Jones' testimony was true as relating to the events concerning not only himself but also of his four co-workers. It was also stipulated that the official petitions of candidacy for Mayor Daley had been filed with the Board of Election Commissioners prior to 8:20 a.m. on December 18, 1974 and thus before these employees were asked to circulate them.

At the conclusion of the evidence, the court discharged Quigley and found the City and Cardilli in civil contempt of court. The court found that since Mayor Daley's petitions of candidacy were filed prior to the time the five workers were summoned to report to Cardilli, the purpose of calling the employees to City Hall and urging them to take the petitions "was to determine whether they would support Mayor Daley's candidacy and/or to coerce and intimidate them by making clear that their departmental superiors, who controlled their jobs, expected them to support Mayor Daley's candidacy." Thus the court found the City and Cardilli in violation of paragraph E of the 1972 judgment.

The court asked plaintiffs to submit a bill of costs and suggest whatever further sanctions they believed necessary. The court awarded costs and attorney fees to plaintiffs[6] but denied their suggestion that the court pursue criminal contempt proceedings against respondents.

II.

Respondents raise various arguments on appeal in support of their contention that the district court erred in holding each of them in contempt.

A.

Their first argument is grounded upon the distinction between civil and criminal contempt. Respondents main-

[6] Costs in the amount of $1174.38 were assessed jointly against the City and Cardilli and attorneys' fees in the amount of $8560.00 were assessed solely against the City.

tain that they were found in *civil* contempt for conduct which could only be found contemptuous after a *criminal* proceeding.

Respondents argue that "past performance of an affirmative act violating a prohibitory order of the court" constitutes *criminal* contempt and therefore it was erroneous for the district court to find Cardilli's actions on December 18 and 19, 1974 in *civil* contempt of court. Respondents thus advance a standard in which the nature of the contemptuous act is determinative of whether a contemnor has committed civil or criminal contempt.

Respondents' proffered distinguishing test is erroneous and attempts to oversimplify a most difficult problem. The distinction between civil and criminal contempt cannot turn on the nature of the *act,* since as the Supreme Court has pointed out, "[c]ommon sense would recognize that conduct can amount to both civil and criminal contempt." *United States* v. *United Mine Workers,* 330 U.S. 258, 298-99 (1947). And as the Court stated over a half century ago, "[c]ontempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.'" *Gompers* v. *Bucks Stove and Range Company,* 221 U.S. 418, 441 (1911), quoting *Bessette* v. *W. B. Conkey Company,* 194 U.S. 324, 329 (1904). See also *Backo* v. *Carpenters' Local 281,* 308 F.Supp. 172, 175 (N.D.N.Y. 1969), *aff'd,* 438 F.2d 176 (2d Cir. 1970), *cert. denied,* 404 U.S. 858 (1971).

The "real distinction between criminal and civil contempt is the nature of the relief asked and the purpose of that relief." 3 C. Wright, Federal Practice & Procedure §704, at 159 (1969); see also In re *Persico,* 491 F.2d 1156 (2d Cir. 1974), *cert. denied,* 419 U.S. 924 (1974); *Southern Railway Company* v. *Lanham,* 403 F.2d 119, 124 (5th Cir. 1968); Comment, *Right to Trial in Contempt Cases: A Critical View of the Sentence Aggregation Rules,* 70 Nw. U.L. Rev. 533, 534 n.3 (1975). In *Gompers* v. *Bucks Stove and Range Company, supra,* the Court stated that distinction in the following terms:

> If [the proceeding is brought] for civil contempt the punishment is remedial, and for the benefit of complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. [*Id.* at 441.]

Cf. *Kienle* v. *Jewel Tea Company,* 222 F.2d 98, 99 (7th Cir. 1955); *United States* v. *Joyce,* 498 F.2d 592 (7th Cir. 1974). Thus while the penalty for criminal contempt is intended to be punitive only, *United States* v. *United Mine Workers, supra,* at 302, the sanctions for civil contempt are "employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, [or] to compensate the complainant for losses sustained." *Id.* at 303-04.[7]

In the instant case, therefore, we must determine the nature of the relief sought by plaintiffs. But such a determination is not necessarily a simple task. Frequently the punitive or remedial nature of the relief sought is readily disclosed by the pleading's averments or by the type of relief prayed for. See, e.g., *Kienle* v. *Jewel Tea Company, supra.* But other times the pleadings are of little assistance; the averments may be sketchy and the relief sought may be appropriate for either criminal or civil contempt.[8]

[7] The Court in *Gompers* did point out that the nature of the contemptuous conduct — "refusing to do an act commanded" as opposed to "doing an act prohibited" — *generally* "affords a test by which to determine the character of the punishment." 221 U.S. at 443. Also, the Fifth Circuit in *Skinner* v. *White,* 505 F.2d 685 (5th Cir. 1974), has stated that among the "essential distinctions" between civil and criminal contempt is that "[c]ivil contempt lies for refusal to do a commanded act, while criminal contempt lies for doing some forbidden act." *Id.* at 688. Use of such a standard to distinguish the two has been criticized as being of little utility. See Dobbs, *Contempt of Court: A Survey,* 56 Cornell L. Rev. 183, 240 (1971), where the commentator also maintains that

> [t]he distinction between mandatory and prohibitory orders in *Gompers* . . . was not intended to be a major test; rather it was merely indicative of cases which contempt sanctions could be coercive and hence civil.

Id. The Court itself pointed out in *Gompers* that a remedial fine could be imposed for "doing an act prohibited." Thus the distinction respondents insist upon, while based on language in judicial decisions, is not the crucial one. See generally 3 C. Wright, Federal Practice & Procedure §704, at 159 (1969); 4 Barron & Holtzoff, Federal Practice & Procedure §2422, at 371-72 (1951); R. Goldfarb, The Contempt Power 49-67 (1969).

[8] For instance, imprisonment may be appropriate relief for civil or criminal contempt; the only difference being that imprisonment for civil contempt must be conditional. *Scott* v. *Hunt Oil Company,* 398 F.2d 810 (5th Cir. 1968). Similarly, a "fine" may be appropriate for either; the only distinction being that in civil contempt it must be compensatory. *United States* v. *United Mine Workers, supra,* at 304; see also *Coca Cola Company* v. *Bisignano,* 343 F. Supp. 263, 264 (S.D. Iowa 1972); *Dakota Corp.* v. *Slope County,* 75 F.2d 584, 586 (8th Cir. 1935).

In such a situation, a court is compelled to journey outside the pleadings and determine the purpose for which plaintiff sought to have the respondent held in contempt. Thus if plaintiff's purpose was to punish a defiance of the court's authority, the relief sought, whatever its form, is punitive. But if his purpose is to assure future compliance or to compensate himself for injury caused by the respondent's violation of the injunction, then the nature of the relief is remedial.

In the instant case, the pleadings alone do not convey whether plaintiffs intended the relief they sought to be punitive or remedial, and the forms of relief sought are not distinctly either punitive or remedial in nature.[9] Hence, we must examine the events and circumstances leading up to and surrounding the filing of plaintiffs' petition in order to discern their purpose in initiating the contempt proceedings against respondents. In so doing, we are led to the inescapable conclusion that plaintiffs were clearly seeking remedial relief to assure future compliance with the district court's 1972 judgment and thus the court properly found respondents in civil contempt of court.

In late 1974 and early 1975, Chicago was in the midst of an election campaign involving numerous city-wide offices. In probable anticipation of problems, plaintiffs asked the district court in December of 1974 to order the

[9] Plaintiffs' petition included the following prayer for relief:

> If upon proper hearing it is determined that [any of the respondents] is in contempt of court, plaintiffs will request the Court to fix a fine to be imposed on such person(s), will ask the Court to impose conditions to purge the contempt, will move the Court to enter additional relief to enforce and to prevent violations of the Judgment by officials of defendant City of Chicago, and will ask for costs and disbursements and a reasonable counsel fee.

Nothing in this prayer for relief is solely punitive in nature. As pointed out in note 8 *supra*, a "fine" may be remedial as long as it is compensatory. Nothing in the pleading or elsewhere in the record sheds any light on the injury or amount of injury sought to be compensated. But this is of no consequence since the district court refused to impose any "fine." Plaintiffs' prayer for additional relief to enforce the judgment and conditions to purge the contempt were also clearly appropriate for civil contempt. See *United States* v. *Greyhound Corp.*, 370 F.Supp. 881, 886 (N.D. Ill. 1974); *aff'd*, 508 F.2d 529 (7th Cir. 1974); *Backo* v. *Carpenters' Local 281*, 438 F.2d 176, 182 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971). And a request for an award of costs and reasonable attorneys' fees was proper. *W. E. Bassett Co.* v. *Revlon, Inc.*, 435 F.2d 656, 665 n.5 (2d Cir. 1970); *United States* v. *Greyhound Corp.*, *supra*, at 886.

City and other defendants to distribute additional notices of the 1972 judgment to their employees. Shortly thereafter plaintiffs learned of Cardilli's conduct of December 18 and 19, 1974 and sought to have him and the City held in contempt. As the election grew closer and the campaign intensified, the fear and possibility of further violations of the 1972 judgment obviously increased. In light of these events and circumstances, the reasonable conclusion is that the plaintiffs initiated contempt proceedings to assure future compliance during the remaining highly critical time before the city election. Thus the nature of relief sought against Cardilli and the City was not necessarily to punish the "past completed acts" of December 18 and 19, 1974, but rather to coerce both respondents, as well as others bound by the 1972 judgment, to comply with the injunction in the future, and specifically during the time remaining before the election. Therefore, since plaintiffs' purpose in seeking relief in contempt proceedings was to coerce future compliance, the district court properly found respondents in *civil* contempt of court.

B.

Also in this regard, respondents maintain that they were unable to determine the "true character of the proceedings" due to its "mélange of civil and criminal traits," citing *Skinner* v. *White*, 505 F.2d 685 (5th Cir. 1974). We fail to see any such "mélange of civil and criminal traits" in the contempt proceeding under review before us. Plaintiffs' petition expressly stated that they sought to have respondents held in *civil* contempt, and the nature and purpose of the relief sought, as well as the forms of relief themselves, as stated *supra*, were all appropriate for a civil contempt proceeding. And of course, since we find that the proceedings were clearly civil in nature, respondents' further argument that they were denied the procedural safeguards concomitant with criminal contempt proceedings totally lacks merit. Respondents here were not "left in doubt as to whether relief or punishment was the object in view." *Gompers* v. *Bucks Stove and Range Company*, *supra*, at 446.

C.

Paragraph E, subsection 1, of the 1972 judgment prohibits the City and its employees and agents from "affecting any term or aspect of governmental employment . . . upon or because of any political reason or factor." Respondents argue that the evidence does not support the district court's conclusion that their conduct violated paragraph E. They point out that none of the employees involved were terminated or otherwise "affected" by the actions of Cardilli.

Of course, violations of injunctive orders must be proven by "clear and convincing" evidence. *United States* v. *Greyhound Corp.*, 363 F.Supp. 525, 570, *supplemented*, 370 F.Supp. 881 (N.D. Ill. 1974), *aff'd*, 508 F.2d 529 (7th Cir. 1974). However, we disagree that plaintiffs were required to show that the workers involved were in fact "terminated" or even that their terms of employment were "affected" in some concrete way. The district court found that the "purpose" of calling the workers to City Hall and urging them to circulate petitions of candidacy of Mayor Daley was to "determine whether they would support Mayor Daley's candidacy and/or to coerce and intimidate them by making clear that their departmental superiors, who controlled their jobs, expected them to support Mayor Daley's candidacy." We believe this finding, amply supported by *stipulated* evidence which was "clear and convincing," clearly amounted to "affecting" the term of employment of the five workers involved. The method by which Cardilli summoned and met with each worker, as well as the atmosphere in which the meetings took place, was inherently coercive and reasonably placed the workers in fear of termination. One employee testified that he feared losing his job if he did not take the petition. These facts alone amply support a finding that Cardilli "affected" the terms of employment of the workers.

D.

Respondents point out that no more than two hours of each employee's working time was involved in the meeting with Cardilli. Therefore, respondents contend that even if Cardilli's actions violated the court's 1972 judgment,

the violation was *de minimis* and can only support an award of nominal damages.

The seriousness of the violations was a matter for the trier of fact to determine and we cannot agree that Cardilli's clear violations of the district court's even clearer order were trivial. Moreover, respondents' contention that only an award of nominal damages was supported by the violations is misplaced since the court refused to award *any* damages. Respondents apparently consider the court's award of *costs and reasonable attorneys' fees* against them as an award of *damages*. This is, of course, erroneous. An award of costs and attorney fees in civil contempt is clearly proper and wholly independent of an award of compensatory damages.[10] *W. E. Bassett Company* v. *Revlon, Inc.*, 435 F.2d 656, 665 n.5 (2d Cir. 1970); *United States* v. *Greyhound Corp.*, 370 F.Supp. 881, 886 (N.D.Ill. 1974).

E.

Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction:

> is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Respondents argue that plaintiffs failed to prove Cardilli possessed actual notice of the 1972 judgment and therefore his contempt determination must be reversed.

While certainly some type of notice of an injunction is required by contemporary notions of due process, cf. *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), we are not convinced that rule 65(d) requires Cardilli to have possessed *actual* notice of the

[10] Respondents argue that the "damages" awarded were out of proportion to the actual amount of attorney fees and costs incurred in the contempt proceeding because the district court also allowed attorney fees and costs pertaining to plaintiffs' motion for an order for further notice of the judgment. We find nothing erroneous in the district court awarding fees and costs to plaintiffs with respect to both proceedings and respondents advance no argument before us that such action on the part of the district court was an abuse of discretion.

1972 judgment. Our reading of that rule discloses that it requires only "persons in active concert or participation with" parties, their officers, agents, servants, employees, and attorneys to have possessed *actual* notice of an injunction before they can be bound by it. Since Cardilli was admittedly an employee of the City (a defendant in the original action) no evidence of *actual* notice was necessary in order for him to be found in civil contempt. However, we need not determine what type of notice is required on the part of "parties, their officers, agents, servants, employees, and attorneys" since we believe that the record supports the conclusion that Cardilli nevertheless did possess actual notice of the 1972 judgment.

The terms of the 1972 judgment required the City to distribute notices of the judgment to all of its employees. That mandate was complied with during the summer of 1972. Cardilli aptly points out that the record does not indicate that he was an employee at the time the notices were distributed. However, in response to the plaintiffs' motion for additional notice filed in January of 1975, the City represented that it had posted notices of the judgment on all departmental bulletin boards and such notices were left posted.[11] In the absence of any statement by Cardilli either before or during the trial to the contrary, it defies our imagination to believe that a high-ranking City official such as Cardilli was unaware of the 1972 judgment.

Moreover, plaintiffs alleged in their petition that Cardilli possessed actual notice of the judgment. Respondents' failure to deny this allegation in their answer must be deemed an admission under Fed. R. Civ. P. 8(d), *McComb* v. *Blue Star Auto Stores,* 164 F.2d 329 (7th Cir. 1947), *cert. denied,* 332 U.S. 855 (1948), since pleadings in a civil contempt proceeding must comply with rule 8, *Philippe* v. *Window Glass Cutters League,* 99 F. Supp. 369, 374-75 (W.D. Ark. 1951), *quoting* 3 Barron & Holtzoff, Federal Practice & Procedure § 1439, at 320; see also 3 Wright, Federal Practice & Procedure § 705, at 161.

[11] Since civil contempt proceedings are a part of the original cause, *Gompers* v. *Bucks Stove & Range Company, supra,* at 446, it was proper for the district court to have considered the City's representation made during the proceeding for further notice.

Since respondents failed to deny Cardilli's notice or otherwise raise the issue of lack of notice at any time before appeal, the district court did not err in finding Cardilli in contempt.

F.

It is elementary that a principal is only liable for those acts performed within the scope of an agent's employment.[12] Based upon this proposition, the City argues, as a final matter, that it cannot be held in contempt because Cardilli's conduct was clearly outside the scope of his employment. We disagree.

Cardilli's action in summoning the five employees to his office and there interviewing each separately was plainly within the scope of his duties. The City contends that there was no evidence before the court bearing on exactly what Cardilli's duties involved. To the contrary, however, Cardilli testified that on the days in question he held the position of Director of Administration of the Department of Streets and Sanitation. It is obvious that such a position involves supervisory functions over employees in the department and that summoning employees to City Hall and interviewing them there are both well within the scope of employment of the person holding that position. The City's argument that in order to hold it in contempt, plaintiffs were required to show that the City authorized Cardilli to order employees to undertake political work is patently frivolous. Hence, the district court did not err in holding the City in contempt along with Cardilli.[13]

[12] See generally Prosser, Law of Torts 461 (4th ed. 1971); Comment, *Corporate Criminal Liability,* 68 Nw. U. L. Rev. 870, 874-75 (1973).

[13] The City maintains that it cannot be held in contempt for Cardilli's violation of the 1972 judgment where Cardilli's actions were also in direct contravention of the City's order to all its employees to obey the injunctive provisions. We agree with the court's statement in *Singer Mfg. Co.* v. *Sun Vacuum Stores, Inc.,* 192 F.Supp. 738 (D.N.J. 1961):

> The orders of the Court must be obeyed, and to absolve a large or small corporate defendant from its responsibilities simply because the corporation has ordered compliance but has not sufficiently policed same, would be to open the door for wholesale disobedience of the Court. [*Id.* at 741.]

See also *Coca Cola Company* v. *Bisignano,* 343 F.Supp. 263, 264 (S.D. Iowa 1972); *United States* v. *Armour & Company,* 168 F.2d 342, 343-44 (3d Cir. 1948).

The judgment of the district court holding defendant-respondent City of Chicago and respondent Michael Cardilli in civil contempt of court is accordingly affirmed.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U. S.
FILED
AUG 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-14

CITY OF CHICAGO AND MICHAEL A. CARDILLI,
Petitioners,

vs.

MICHAEL L. SHAKMAN, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case involves findings of civil contempt entered by the United States District Court for the Northern District of Illinois against Mr. Michael Cardilli and the City of Chicago for violation of a consent Judgment previously entered in the case. Mr. Cardilli was Director of Administration for the City's Department of Streets and Sanitation.

The underlying substantive issues of this lawsuit are not now before the Court. Nor does the Petition concern the propriety of remedial orders entered by the District Court as a consequence of the contempt proceeding. Rather, the Petition

only concerns the District Court's findings of civil contempt for violation of the consent Judgment.

The Consent Judgment

The Judgment, entered May 5, 1972, by consent of the parties, prohibited the City of Chicago, as well as various other state and county office holders, and their officers and employees from coercing governmental employees into doing partisan political work. Paragraph E(1) of the Judgment enjoined the conditioning or basing of any term or aspect of non-policy-making governmental employment on political reasons or factors. Paragraph E(2) prohibited persons bound by the Judgment from causing or permitting public employees to do political work on public time.

Under the Judgment the District Court also retained jurisdiction to enter further orders required to implement and carry out the terms of the Judgment. [The applicable portions of the consent Judgment are set forth in the opinion of the Court of Appeals. Petition 2a-3a]

The Civil Contempt Petition

The civil contempt petition brought by plaintiffs [respondents here] alleged that the injunctive provisions of the Judgment were violated when City officials, including Mr. Cardilli, sought in December, 1974, to coerce and intimidate City workers into circulating petitions of candidacy for Mayor Daley for the 1975 Chicago mayoral elections. This was alleged to have taken place on City time. The contempt petition sought findings of civil contempt and asked for remedial relief, both to eradicate the effect of the violations and to implement and assure compliance with the Judgment. Contemporaneously, plaintiffs moved the Court for an order directing the City and other defendants to give their employees prior to the 1975 mayoral elections additional notice of their rights under the Judgment.

The District Court determined to hear the evidence on the contempt petition before ruling on the request for further remedial relief.

The Evidence

The testimony at the contempt hearing showed clear—indeed admitted—violations of the Judgment. [The testimony is discussed accurately in the opinion of the Court of Appeals. Petition 3a-5a]

Basically, the evidence showed that a number of City sanitation workers from the City's Third Ward were summoned to City Hall on December 19, 1974, during working hours, by Mr. Cardilli and were directed to take and circulate petitions of candidacy for Mayor Daley for the City's 1975 mayoral primary elections. The leadership of the Democratic Party organization in the Third Ward (a predominantly black area) had recently decided not to support Mayor Daley's reelection.

A principal witness, Mr. George Jones, testified that he and five other untenured City garbagemen from the Third Ward were ordered by their superintendent to report to City Hall. They were then taken in, one by one, to see Mr. Cardilli, who checked their names off on a list. Director Cardilli asked Mr. Jones if he would take and circulate petitions for Mayor Daley. After being asked twice to take the petitions Mr. Jones responded "Why? What would happen if I don't?" and Director Cardilli repeated, his voice rising for emphasis, *"Are you going to take them?"* Mr. Jones did. All of this took place during regular working hours. Mr. Jones testified that he feared for his job if he did not take and circulate the petitions. It was stipulated by the petitioners that Mr. Jones' testimony was true not only as to him but as to the other sanitation workers involved. [Petition 4a-5a]

Mr. Cardilli was the Director of Administration for the City's Department of Streets and Sanitation. His responsibilities included personnel matters for the Department. He kept the personnel files for the Department in his office.

There was evidence that on the same day a number of other Third Ward City and Cook County employees were also summoned downtown to be asked by their employment superiors to circulate the Daley petitions.

The Decisions Below

The District Court found that the events in question violated the Judgment. The Court found:

> "10. The treatment of all six employees, as described above, was inherently coercive and intimidating of them.
>
> 11. On the basis of all of the evidence—including but not limited to the facts set forth in paragraph 4, the fact that Richard J. Daley's petitions of candidacy were filed with the City Clerk prior to 8:20 a.m. on December 18, and the fact that other patronage jobholders from the Third Ward were talked to about taking Daley petitions by their employment superiors in other governmental agencies on December 18 or 19—the Court finds that the purpose of calling the six employees down to City Hall and urging them to take petitions was to determine whether they would support Mayor Daley's candidacy and/or to coerce and intimidate them by making clear that their departmental superiors, who controlled their jobs, expected them to support Mayor Daley's candidacy.
>
> 12. By reason of the foregoing, both the City of Chicago and Michael Cardilli violated paragraph E of the Judgment."

The court entered findings of civil contempt against Mr. Cardilli and the City and directed the City and certain other defendants to give additional notice of the Judgment prior to the 1975 mayoral election. Plaintiffs were also awarded their fees and costs in the contempt proceeding totaling $9,734. Contrary to the repeated statements in the Petition, no fine, monetary damages or punishment of any kind was imposed on the petitioners.

No defendant appealed the order directing that additional notice of the Judgment be given to affected employees. The

City and Mr. Cardilli appealed the finding of civil contempt. On appeal the Court of Appeals affirmed the findings of civil contempt and the award of fees and costs. No petition for rehearing was filed.

The mandate of the Court of Appeals has now issued, that court having denied petitioners' motion for a stay pending disposition of the Petition for certiorari as frivolous. Mr. Justice Stevens denied petitioners' motion to recall the mandate.

ARGUMENT

Respondents respectfully submit that a writ of certiorari should not issue because the case as now before the Court presents no important issues of federal law which require decision by this Court. Moreover, the matters raised in the Petition were, it is respectfully submitted, correctly decided below.

I. NO IMPORTANT ISSUES OF FEDERAL LAW ARE INVOLVED

The Petition raises no legal issues of sufficient importance to merit review. Indeed, it does not even assert that the case presents important issues of federal law which require ruling by this Court. Nor does the Petition provide any other appropriate reason why the Court should grant the writ. Rather, the Petition primarily concerns the sufficiency of the evidence and the application of uncontested legal principles to the facts of the case. These are not matters which require review by this Court.

II. THE QUESTIONS PRESENTED IN THE PETITION WERE CORRECTLY DECIDED BELOW

Not only are the points raised in the Petition not of sufficient importance to merit review they were, respondents submit, correctly decided below.

A. A Civil Contempt Proceeding Was Proper to Remedy the Violations of the Judgment

The Petition [10-12] argues that because the violations of the Judgment had taken place before the contempt proceeding began, civil contempt could not lie. It also argues that the contempt proceeding here resulted in punishment which was

not the proper office of civil contempt. [12-17] Neither argument has merit.

It was uncontested that civil contempt lies for remedial reasons—either to remedy past violations of a judgment or to enter additional relief to ensure compliance with the court's order. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 193 (1949).

Here the civil contempt petition sought purely remedial civil relief, both to undo the effect of the violations and to ensure future compliance with the Judgment. [Petition 8a, note 9] And the relief granted was purely remedial. The order to give additional notice to employees as to the Judgment served to help undo the coercive and intimidating effect of the violations. It also served to effectuate the Judgment and ensure its future compliance. The findings of contempt themselves, in addition to forming the basis for the remedial order, similarly served remedial purposes by exposing the violations and preventing further coercion of the employees involved.

The suggestion in the Petition [12] that civil contempt cannot lie for past actions is wholly wrong. A court would be weak indeed if it could not enter additional orders to undo the effect of violations of its Judgment or to take steps to prevent reoccurrence of violations.

Contrary to the repeated and erroneous assertions of the Petition, *no punishment of any kind was imposed.* No fine or award of damages was imposed. No incarceration was ordered. The only monetary aspect of the case was the award of plaintiffs' costs and reasonable attorneys fees. Petitioners admitted below that an award of attorneys fees is appropriate in civil contempt.

There is no conflict, as suggested by the Petition, between the decision below and *Skinner* v. *White*, 505 F. 2d 685 (5th

Cir. 1974), where a contempt proceeding was reversed because the defendants could not tell if civil or criminal contempt was involved. Here, there was no confusion as to the nature of the proceeding. The contempt petition clearly stated that civil contempt was alleged and, as the Court of Appeals held, "the proceedings were clearly civil in nature". [Petition 9a]

Moreover, it may be noted that petitioners' various points as to the propriety of civil contempt were, by and large, not adequately raised in the District Court.

B. The Evidence Was Sufficient to Support the District Court's Findings

The Petition [17-21] argues that in a number of respects the evidence was insufficient to support the findings of civil contempt. Obviously, these are not matters which normally require Supreme Court review. In any event, respondents submit that the evidence was more than sufficient to support the findings below.

1. The Evidence Was Sufficient to Show Violations of the Injunctive Provisions of the Judgment

The Petition [17] urges that the evidence did not show violations of paragraphs E(1) and E(2) of the Judgment as charged in the petition. This is wholly wrong. The Court of Appeals correctly held that the coercion of City workers into supporting the incumbent in his reelection bid, as found by the District Court, was sufficient to show a violation of paragraph E(1) of the Judgment. That paragraph prohibits affecting the terms of public employment for political reasons. Moreover, it was *admitted* that paragraph E(2), which prohibited political work being done on public time, was violated. [Petition 10a]

2. The Evidence Was Sufficient to Show That Mr. Cardilli Had Notice of the Judgment

The Petition [18] also urges that the evidence was insufficient to show that Mr. Cardilli had notice of the Judgment. To the contrary, there was very substantial evidence that Mr. Cardilli did have this notice. As the Court of Appeals pointed out, the City had represented to the District Court that it had fully notified its employees of the Judgment. The court concluded:

> "[I]t defies our imagination to believe that a high-ranking City official such as Cardilli was ignorant of the 1972 judgment." [Petition 12a]

3. The Evidence Was Sufficient to Show That Actions of Mr. Cardilli Were an Abuse of His City Authority

The Petition [20] argues that the evidence was insufficient to support the conclusion that Mr. Cardilli's conduct was performed within the scope of his City employment. Thus it argues that the City was not properly made a respondent in the civil contempt petition.

In fact, however, the evidence clearly showed that the acts of Mr. Cardilli were within the scope of his employment. He held a high office in the City, he had responsibility for personnel matters for his City department, he maintained personnel files in his office and he used other City supervisors junior to him to carry out the violations. As the Court of Appeals held:

> "It is obvious that . . . summoning employees to City Hall and interviewing them there . . . [was] well within the scope of employment of the person holding the position" [Petition 13a]

It was, therefore, entirely appropriate for the City to be required to take the necessary steps to remedy the violations of the Judgment committed by its high ranking officials.

CONCLUSION

For these reasons, respondents respectfully submit that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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